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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

November 15, 2000

Ms. Magalie Roman Salas
Secretary
Federal Communications Commission
445 12th Street, S.W.
Washington, D.C. 20554

Re: Comments of IP Communications Corporation in CC Docket No. 00-217

Dear Ms. Salas:

Pursuant to the Commission's public notice, IP Communications Corporation ("IP") hereby files its comments in CC Docket No. 00-217 relating to SWBT's applications for Section 271 Relief in Kansas and Oklahoma.

If you have any questions, do not hesitate to contact me.

Sincerely,

Howard J. Siegel
Vice President of Regulatory Policy
IP Communications Corporation

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List A B C D E

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

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Southwestern Bell Telephone Company,	)	
And Southwestern Bell Communications	)	
Services, Inc. d/b/a Southwestern Bell Long	)	
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Comments of IP Communications Corporation on SBC's Applications for 271 Relief in Kansas and Oklahoma

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Comments of IP Communications Corporation on SBC's Applications for 271 Relief in Kansas and Oklahoma

On October 26, 2000, SBC Communications Inc. and its subsidiaries, Southwestern Bell Telephone Company and Southwestern Bell Communications Services, Inc., d/b/a Southwestern Bell Long Distance (collectively, SWBT and/or SBC) filed a joint application for authorization to provide in-region, interLATA service in the States of Kansas and Oklahoma, pursuant to section 271 of the Communications Act of 1934, as amended (the Act), 47 U.S.C. § 271. IP Communications Corporation ("IP") hereby responds pursuant to the Common Carrier Bureau's Public Notice issued the same day.[1] As was noted in the Public Notice, pursuant to section 271 of the Communications Act of 1934, as amended, an applicant must demonstrate compliance with section 271 on a state-by-state basis. Moreover, where an applicant files a joint or multi-

state application, as here, the Commission will determine for each state whether the application complies with each item of the section 271 competitive checklist and other requirements of the statute.

As will be demonstrated in these comments, the undue pressure placed on the respective state commissions has led to a rush to judgment in these 271 proceedings forcing state commissions to base decisions on guesses and beliefs of what SWBT's performance will be rather than having a detailed review of the performance that exists. This bypassing of the development of a true record is particularly acute in the area of digital subscriber line ("DSL") related issues, including but not limited to line sharing. It is IP's hope that in this proceeding, the FCC will reject the applications with sufficient guidance so that the competitive concerns can be addressed at the state level thereby lowering barriers to entry and strengthening SWBT's future applications for Kansas and Oklahoma.

I. INTRODUCTION AND SUMMARY

The Commission should understand IP's comments from the perspective from which they come. All things being equal, it is irrelevant to IP whether SWBT receives long distance relief, with the exception that DSL competition will be harmed should SWBT be the only carrier that can realistically provide a combined local, long distance, and DSL bundle. Instead, IP's predominant role is to achieve an irreversible competitive market before the 271 incentive is removed. This is demonstrated by IP's pleadings in these dockets whereby IP consistently proposes solutions to problems that would simultaneously remove barriers and strengthen

[1] Comments Requested On The Application By SBC Communications Inc. For Authorization Under Section 271 Of The Communications Act To Provide In-Region, Interlata Service In The States Of Kansas And Oklahoma, FCC Public Notice, CC Docket No. 00-217 (rel. Oct. 26, 2000).

SWBT's 271 application. IP is hopeful that such efforts to reduce barriers to entry have not been for naught.

This need has become particularly acute with SBC effectively purchasing Covad's silence through a 6 percent investment and an out of region business arrangement. Covad has been, and would have continued to be, the carrier best able to litigate issues on a state-by-state basis. That option has been buried by SBC. CLECs also may not be able to rely on AT&T to carry the regulatory water any longer based on AT&T's pending restructuring. Additionally, small carriers have found themselves having to trade away their voices in exchange for minor concession from SWBT.[2] And finally, these states are less populous than Texas and New York. As a result, CLECs are less able to designate the resources for additional litigation to make up for issues that were not fleshed out and addressed in the state 271 proceedings.

Second, the FCC should be aware that CLECs have broadly requested a more collaborative process at the state level to address issues in a manner consistent with what occurred in Texas and New York. In spite of that precedent, SWBT refused to discuss issues in such a format. As a result, it would be a tremendous fraud on the CLECs and the state commissions involved if SWBT is allowed to change the character of the application by supplementing the record developed at the state level now at the federal level. Unlike Texas, where a certain amount of supplementation may have been appropriate to round out the edges of the extensive collaborative process, it would be wholly inappropriate for SWBT to build a record

[2] For example, Birch agreed to support SWBT's 271 relief even though its critical OSS issues have not been addressed. In return, Birch received minimal in return, e.g. an agreement that SWBT will apply an interpretation of the Texas PUC as it applied to identical contract language and an agreement that SWBT would jointly propose state dispute resolution rules that could have been enacted by state commissions without SWBT's agreement (as was done in Texas).

beyond that of the state proceedings when parties were denied an opportunity to fairly participate.

To simplify the review of this pleading, for Kansas, IP attaches its reply comments that were filed at the state level in Kansas.[3] Consistent with the intent of the "prior public notice", IP understands that the Kansas document will count toward the 100-page limit. That pleading is incorporated herein as if restated at length. None of the issues addressed in IP's reply comments were addressed at the state level because CLECs were denied an opportunity of a hearing or collaborative process on SWBT's revised application. What was clear in the Kansas proceeding was that the Commission failed to properly apply the burden of proof. For example, when there was an absence of adequate performance data relating to xDSL loops and line sharing, the Commission relied on the Kansas staff recommendation that stated staff's "belief" that there would be good performance once volumes picked up. Clearly, a 271 application cannot be supported by such nonevidence. Moreover, as IP explained in its Kansas reply comments, SWBT's performance measures witness agreed during the Oklahoma 271 hearing that the porting of provisioning performance data from one state to another would be erroneous. In spite of that agreement, the Kansas staff recommendation that was adopted by the Kansas commission did just that.

Regarding Oklahoma, the Commissioners presided over a four-day hearing that led to some important Commission imposed conditions. Notwithstanding those conditions, serious barriers to entry continue to be in place in Oklahoma, such as excessive nonrecurring charges, e.g. nonrecurring loop and operation support system ("OSS") service order rates, a failure to

[3] IP continues to support certain issues discussed in the attached Kansas reply comments but that are not duplicated specifically in these comments to avoid the need to request a waiver of the 100-page limit. These issues included : unreasonable restrictions on unbundled transport, the need to condition 271 relief on merger condition compliance,

demonstrate, DS1 loops, xDSL loops, and line sharing are adequately provisioned to competitors, a necessary streamlined process to move to permanent TELRIC-based rates in the immediate future, etc.

Justice and a fair resolution of issues will not be had through SWBT steamrolling the process at the state level and then negotiation with FCC staff on a new and much different application. Such conduct would make a farce out of the state proceedings, send the message to CLECs not to participate in state proceedings in the future, and will not achieve the benefits from the federal-state partnership that was supposed to be developed in the 271 process. With further guidance to state commissions on how to evaluate an application, IP is hopeful that the issues addressed by IP and others can be fully addressed at the state level such that when these applications come back to the Commission, for example in 6 to 9 months, there will be a record in place that can be used to evaluate the true status of competition in these states. Lastly, these dockets are only the first step. If SWBT achieves the lowering of the bar in these proceedings, the standards set in Texas and New York will never be achieved again. Worse yet, there will be even further testing of the Commission's resolve as RBOCs test the ability to lower the bar even further. Instead, a forceful and direct decision is necessary that will limit SWBT's ability to force such dockets through state commissions in the future.

II. EXCESSIVE RATES

Simply stated, the rates in Kansas and Oklahoma are generally excessive when compared to the Texas rates that this Commission found to be TELRIC-based in its *Texas 271 Order.*[4]

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and the need for the separate data affiliate requirement to remain indefinitely to the extent SBC relies on that structure to support its application.

[4] Application by SBC Communications Inc., Southwestern Bell Telephone Company, And Southwestern Bell Communications Services Inc. d/b/a Southwestern Bell Long Distance Pursuant to Section 271 of the

Attached to these comments as Attachment 1 is a side-by-side that was prepared by the Staff of the Missouri Commission that lays next to each other the T2A, K2A, O2A, and proposed M2A rates.[5] The side-by-side demonstrates startling differences in rates. Just to pick out a few of the differences, IP shows the following table comparing Texas rates with Oklahoma and Kansas.[6]

Price Element	Texas	Kansas	% Difference from Texas to Kansas	Oklahoma	% Difference from Texas to Oklahoma
2W Digital Loop (NRC)	15.03	157.20	**1,046%**	93.24	**620%**
Analog Port (NRC)	1.27	39.37	**3,100%**	1.20	**94.5%**
Feature Activation (Analog Port)	0.05	0.76	**1,520%**	1.83	**3,660%**
Feature Analog Arrangement (Hunting)	0.05	9.60	**19,200%**	22.08	**44,160%**
Analog Port Features (Most)	0.05	1.76	**3,520%**	4.26	**8,520%**
DS3 Interoffice Transport (Urban Mile)	9.29	17.51	**188%**	58.67	**631.5%**

This Commission has repeatedly held that UNE prices must be TELRIC-based before 271 Relief can be granted. Moreover, in the FCC *Texas 271 Order*, this Commission held that the Texas rates are TELRIC-based. No state-specific cost factor can justify a rate that is 192 or

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Telecommunications Act of 1996 To Provide In-Region, InterLATA Services in Texas, *Memorandum Opinion and Order*, CC Docket No. 00-65, rel. June 30, 2000 ("*Texas 271 Order*")

[5] For clarity, it is IP's understanding that while urban rates are Zone 3 in Texas, Oklahoma, and Kansas with Zone 1 being rural, the opposite is true in Missouri. In a few places but not all, IP has added hand markings to make the appropriate comparison clear. Also, Missouri has a Zone 4. IP believes Zone 4 denotes separate rates for Springfield, Missouri. (An electronic version of this attachment is not filed with these comments.)

[6] IP would like to clarify two points. First, IP does subscribe any negative attribute to either Commission for SWBT having such rate disparities. The existence of rates above TELRIC can result from a number of factors, many of which beyond the state commission's control. That said, the existence of rates above TELRIC is of great concern. Moreover, until a track record is developed that reasonable rates are being derived in state proceedings, this Commission must consider whether a 271 application can be supported based on interim rates. In other words, this Commission must have a sufficient confidence on the state rate process before it can accept interim rates with the knowledge that the development of permanent rates will be going back to that state process.

441 times that of a Texas TELRIC-based rate. And, while this is a selective table and there are a small number of rates that are even lower in Kansas and Oklahoma, there are critical rates in these states that are simply not TELRIC-based. This is not an indictment against the Kansas and Oklahoma commissions. It is simply a case that for whatever reason, the historic proceedings in those states did not achieve compliant rates. It is IP's understanding, however, that many of the rates incorporated into the K2A and the O2A did not have the same degree of litigated process as took place in Texas. This concern also applies to the interim collocation rates in Kansas that are largely adopting SWBT's proposed rates that were never reviewed prior to being accepted as interim rates. Moreover, as this Commission has become acutely aware, CLECs simply are not in a position to relitigate every rate in each and every SBC state without having a benchmark from which to work. This is particularly true now that SBC has assured through its investment in and joint marketing arrangement with Covad, that Covad's regulatory resources will no longer be a check on SWBT's rates[7] as well as the pending restructuring of AT&T. To reach a fair middle ground that would maintain the integrity of the TELRIC review, streamline the costing process, and allow SWBT to seek adjustments wherever there truly is a state-specific difference in plant or other tangible cost, IP has proposed the following process:[8]

IP's proposal for Kansas and Oklahoma, as filed in Missouri, is as follows:[9]

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[7] With the possible exception of loop conditioning rates.

[8] IP proposed this process during the Kansas and Oklahoma proceedings in a manner that was more focused on the DSL specific issues. Based on discussions in Missouri, IP has fleshed out the proposal to address rate issues more generally. The 5 step process was specifically proposed by IP in Missouri.

[9] Because of the difficulty in responding to two applications in one pleading when those states are not similarly situated, IP includes the full process as filed in Missouri so the Commission has a clear view of the totality of issues CLECs are faced with addressing. Regarding Oklahoma, the Commission adopted some of the steps in this process. For example, it adopted the interim line sharing and line splitting rates as they are approved by the Texas PUC. Oklahoma also adopted the interim collocation rates in Texas. Although Kansas adopted the Texas collocation tariff with minor changes, it largely adopted SWBT's proposed collocation rates that were never reviewed by the Kansas commission. Also, regarding Kansas, Kansas has adopted line sharing rates similar to Texas interim rates.

1. "The existing T2A, the Texas collocation tariff, Texas xDSL interim rates, Texas line sharing interim rates, Texas line splitting interim rates once developed and Texas Pronto-related interim rates once developed, be adopted as interim Missouri rates."
2. "When the permanent collocation, xDSL, line sharing, line splitting, and Pronto-related permanent rates are set in Texas, those rates will become the new interim rates in Missouri";
3. "For the T2A rates that are permanent in Texas today, SWBT and CLECs will have six months to establish state-specific cost factor hearing to adjust the rates based on proven state-specific differences between Texas and Missouri. If no request is made in the 6 month period, the rates become permanent";
4. "As the collocation, xDSL, line sharing, line splitting, and Pronto rates become permanent in Texas, the same 6 month period would apply"; and
5. "All interim rates would be subject to true-up with the exception that for those rates that are permanent in the T2A, the ability to true-up the rates would go away if Missouri-specific rates are not developed within 6 months after a conforming M2A is approved. For those rates that are not permanent in Texas, if Missouri-specific rates are not developed within 6 months of those rates being final in Texas, there would not be a true-up."

This proposal is balanced to take into account the long-term interests of SWBT and CLECs and assures that the present rates do not become a barrier to achieving an irreversibly open market.

The use of Texas rates is a logical starting point. First, the FCC in the Texas 271 proceeding reviewed most of the Texas rates. Second, SWBT already borrows some rates from the T2A and heavily relies on other aspects of the Texas 271 proceeding. Third, in Missouri, the CLEC participants largely agreed with the position that use of the Texas rates would alleviate concerns that the CLEC ability to compete would be frustrated by the existing rates in that state. This is a position that IP would apply to Kansas and Oklahoma as well.[10]

Regarding those rates that are interim in Texas, IP proposes incorporating the results of the Texas permanent proceedings as updated interim rates for Kansas and Oklahoma. This step in the process has two purposes. First, it is a proposed concession to SWBT. If SWBT demonstrates in Texas that the interim rates are too low, it seems reasonable that SWBT should not have to continue to charge those lower rates in other states. Second, it is expected that in the permanent cost proceedings, additional rate elements will be developed. For such new rate elements, there would need to be an appropriate interim rate in Kansas and Oklahoma.

The purpose of the 6-month window to seek a state-specific cost factor adjustment is necessary to provide certainty to the industry that once the 6 month window expires, SWBT and CLECs alike will know the rates that will govern their relationship. By removing the cloud of uncertainty, CLECs can focus on executing their business plans without having to restrain their activity based on rate uncertainty. This idea was developed by the Oklahoma commission, and IP believes that the Oklahoma commission's decision on this point is instructive and should be broadly applied.

The purpose of the true-up is again a concession to SWBT. During state proceedings, SWBT has suggested that certain state-specific cost factors could justify a state rate that differs

[10] For example, the permanent rate hearing for Collocation has already taken place. The permanent rate hearing for line sharing will take place this month. Moreover, the permanent rates for line sharing are expected to largely be

from Texas. IP agrees that there is such a theoretical possibility. Given the existence of such a theoretical possibly, IP believes SWBT, as well as CLECs, should have the ability to come to the Commission and provide that a specific adjustment is appropriate based on demonstrated differences. The default in such a proceeding would be in favor of the then existing rates ported from Texas, and the burden of proof would be on SWBT or the CLEC seeking a state-specific modification. Of critical import, there must be a tangible difference between the two states as opposed to SWBT simply arguing that it did not like a Texas decision and therefore seeks to change the rate.[11] During the Oklahoma proceeding, SWBT suggested that there are too many steps to IP's proposal. If SWBT believes this step is not necessary, IP can agree to simply making the Texas rates permanent in Kansas and Oklahoma.

III. LACK OF DEMONSTRATED PERFORMANCE TO CLECS TO SUPPORT SWBT'S COMPLIANCE WITH THE *LINE SHARING ORDER* AND THE *UNE REMAND ORDER.*

It should go without saying that for there to be irreversible competition in the area of advanced services, SWBT must accurately and timely provision DSL-related UNEs. For example, Performance Measure 58 is one of the key measure because it measures a key customer affecting performance, provisioning timeliness. If SWBT is late, the CLEC misses a customer committed due date. Once commercial CLEC volumes exist, it will be telling whether SWBT has in place methods and procedures that are necessary to achieve adequate performance. Such volumes do not currently exist in these states, particularly for line sharing.

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applicable to line splitting because the network deployment of line sharing and line splitting should be the same.

[11] For example, if SWBT can demonstrate that it pays workers in Kansas $15 per hour but only $12 per hour in Texas, an adjustment would be appropriate if SWBT can also demonstrate that the variance is reasonable and forward looking. That said, it would not be sufficient for SWBT to show that prior Texas decisions picked labor rate "A" while prior Kansas decisions picked labor rate "B".

SWBT's website now incorporates information relating to the DSL disaggregations between standalone loops and line sharing. A mere cursory review demonstrates that commercial volumes do not exist for line sharing. Specifically, SWBT did not provision a single line-shared loop in Kansas or Oklahoma during the month of September 2000.[12] Similarly, DS1 loops provisioning has been poor meeting the three day interval only 51.3 percent of the time in Kansas, less over the last three months.

As IP demonstrated in the Oklahoma 271 hearing, numerous implementation problems have frustrated IP's market entry in Texas. SWBT is attempting to work these issues out with IP but the causes are generally at the central office level. And, the central office performance in Kansas and Oklahoma has not been tested by commercial volumes or third party testing. Rather than repeating the detailed concerns here, IP refers to the related discussion in Attachment 4, IP's reply comments in Kansas, which have been incorporated herein as if set forth at length. The concerns raised in that document equally apply to Kansas and Oklahoma even though the specific discussion regarding the clear misapplication of the 271 burden of proof relates to the specific language in the Kansas staff recommendation.

IP has made a significant investment in Kansas and Oklahoma with the collocation space purchase and equipment. IP fully intends to provide services using xDSL UNE loops and line sharing to the customers of Kansas and Oklahoma and is concerned that SWBT has not comprehensively educated its employees as to SWBT's requirements and role in provisioning these facilities for IP. That said, other companies in the SBC region are finding it necessary to return collocations in large part due to performance and pricing barriers that have taken too long to rectify causing financial distress to those companies.

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[12] Attached as Attachment 2 are selected tables from SWBT's reported performance measures relating to DSL performance in Kansas. Attachment 3 contains DSL performance data for Oklahoma.

As a final note in this area, while from a legal perspective it is obvious that performance to ones affiliate cannot support 271 relief, as a factual matter, the Commission must understand two points. First, line sharing is provided by two different configurations in SWBT's region. Most data providers, including IP, use ILEC-owned splitters.[13] Other data providers, including SWBT's data affiliate ASI, use CLEC-owned splitters. What IP has encountered is that some technicians are familiar with the wiring necessary when CLEC-owned splitters are used but not ILEC-owned. This fact is fine for SWBT's affiliate, but CLECs, like IP, are suffering. IP simply cannot relive a replication of the problems in other states that were experienced in Texas.[14] SWBT has agreed to improve the training in all 13 states including Kansas and Oklahoma; however, IP is looking for evidence through commercial performance or blind testing, as contemplated by prior FCC 271 decisions, before it can be assured that its marketing efforts in Kansas and Oklahoma will not be frustrated.

IV. SWBT FILTERS LOOP MAKE-UP DATA IN VIOLATION OF THE *UNE REMAND ORDER.*

In spite of the assertions in the SWBT affidavits, SWBT does not provide CLECs real-time access to all loop pre-qualification and loop qualification information that is contained in SWBT's electronic databases.

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[13] To the best of IP's knowledge, all CLECs plan to use ILEC-owned splitters with the exception of Rhythms Links.

[14] **Unfortunately, it is not clear that the full extent of these Texas problems will show up in the Texas performance measures. For example, even when SWBT fails to complete the provisioning for line sharing by failing to reconnect the voice circuit, SWBT's performance data will show that the provisioning was completed when that wiring "was supposed to" be done. Second, in meetings with SWBT, it has been suggested that resulting trouble tickets will not show up on a CLECs trouble reports because the trouble is on the voice circuit. In other words, even though the outage is caused by faulty provisioning of line sharing, the trouble reports are being coded as maintenance trouble on SWBT voice customer thus the failure in the provisioning process not only will not be captured, it has the ironic affect of making SWBT's retail performance to itself appear worse than it really is.**

As a brief background, SWBT provides three types of loop qualification data: distribution area data, worse cases of all loops in the distribution area (also known as red yellow green by many SBC and CLEC personnel); mechanized data originating from Loop Facilities Assignment Center Services (LFACS); and manually derived data, where a engineer looks at paper records and mechanized records and provides some information back to the CLEC.

CLECs recently learned during a DSL forum in Texas that the SBC incumbent LECs have determined what information to provide CLECs and what information to screen out when providing loop qualification information. For example, with mechanized loop qualification, SWBT determines on which loop to the customer's address it will provide information to the requesting CLEC. To illustrate, assume there are three loops to a specific address. SWBT may decide to give information on loop "three" to the CLEC, while never informing the CLEC that the other two loops might be compatible for DSL services. In the case of manual loop qualification, SWBT again determines which is the "best" loop of the three for DSL purposes, again never telling the CLEC the loop make-up of the other two loops. For manual loop qualification, the SWBT engineer would have reviewed all loop records to the address to determine which loop is "best" and through his/her determination provided information for only that loop, even though he/she had to review information on all three to make this determination.

This form of screening harms CLECs and is in violation of the *UNE Remand Order*. First, the SWBT determined "best" loop may not be the best loop in the opinion of the CLEC. SWBT is required to provide CLECs all of the loop information to the residence so the CLEC can make its best business decision without having its options limited by SWBT's screening process. Moreover, in addition to providing loop make-up information on all loops to the

location, the CLEC needs to know which loop is currently associated with the telephone number supplied by the CLEC to SWBT.

Second, as an example, customers may request more than one DSL line to a location. If the customer has DSL on one line already, the CLEC will need information on the "second best" line. The bottom line is that there will be innumerable situations that will occur in the real world. CLECs require all the loop make-up information to a location to be able to address the multitude of customer situations that will arise. Moreover, this clear need for information was recognized in this Commission's *UNE Remand Order* but has not been recognized by SWBT.

V. SWBT DOES NOT PROVIDE A REASONABLE LEVEL OF ACCURACY WHEN IT PROVIDES LOOP MAKE-UP DATA.

For all the reasons that ILECs are required to provide loop make-up information to CLECs, it is critical that information provided by the ILEC is accurate. Database and manual record inaccuracy is a substantial concern for DSL providers throughout SBC's ILEC territories, including SWBT. In various SBC forums, concerns regarding such inaccuracy have been raised by IP, AT&T, COVAD, Northpoint, Rhythms, Primary and Mpower. Each company has relayed various testimonials as to percentages showing the pervasiveness of inaccurate loop information. Rather than subscribing specific numbers to different companies, it is clear by the aggregate concern from the CLEC community that concerns regarding inaccurate loop information, whether in a mechanized database or in manual loop records used in lieu of mechanized databases, is a substantial concern.

Because CLECs rely on the loop make-up information when: (1) determining whether to offer service to a customer, and (2) determining what commitments should be made to that customer, SWBT should be responsible for inaccuracies. (Since the conclusion of the Texas 271

proceeding, the Texas PUC recognized this when it adopted a loop make-up information accuracy performance measure which is attached as Attachment 5. Moreover, SWBT voluntarily proposed to make the same measure available in Kansas and Oklahoma, as well as other states. As a result, the policy favoring the need for improved accuracy of loop make-up information has already been decided. What IP seeks are additional steps to assure that adequate incentives are created to get there.)

Database inaccuracy affects a DSL provider's ability to serve customers in a number of ways. Such inaccuracy causes costly delays and inappropriate business decisions based on false indicators in SWBT's records. Loop make-up information can be wrong in a number of ways including loop-length, loop loading, and loop disturbers.

The following examples illustrate how inaccurate loop information can harmfully affect a CLEC providing DSL services by giving false indicators regarding the need for deconditioning, i.e. removal of load coils, repeaters, or excessive bridged tap. First, a CLEC must determine if the costs of deconditioning make serving the specific customer cost-acceptable or cost-prohibitive. Also, when the CLEC decides to order the deconditioning, the installation interval quoted to the customer is longer because SWBT quotes a longer provisioning interval to the CLEC when deconditioning is required.

When the loop make-up information incorrectly directs the CLEC to determine that loop deconditioning is not required, the CLEC will likely accept the customer's order, request a loop from SWBT, and quote the shorter installation interval to the customer. At the provisioning stage, SWBT is likely to discover that its loop records were inaccurate, e.g. the loop requires the removal of load coils but the records suggested there were no load coils on the loop. If SWBT did not catch its inaccuracy at the time of provisioning, as part of trouble-shooting, IP would

discover that the loop information provided by SWBT was materially incorrect and that the loop has load coils that must be removed so as to provide the DSL offering.[15]

From the customer's perspective, the interval quoted to the customer will be wrong. The CLEC will have to contact the customer, apologize for providing an erroneous installation date, and reschedule (assuming the customer does not switch to another provider). The customer's frustration will be focused on the CLEC even though the cause was SWBT. Second, the CLEC, having already made a commitment to the customer, may be forced, from a business standpoint, to order the loop deconditioning rather than back out on the sale. Otherwise, the CLEC may exacerbate the harm to its reputation. This obligation remains even if the CLEC would have declined the customer based on deconditioning costs had the CLEC received accurate information from the beginning.

In this situation, the CLEC is not only out the costs associated with procuring the customer and retaining the customer, but the appearance is left that the CLEC has mishandled the commitment and sale. Not only will that customer have a negative impression of the CLEC, that customer will not likely be recommending that CLEC to his or her friends. Instead, the customer will likely speak negatively about "this new DSL Company" that "doesn't know what it is doing." And, of course, the root cause was SWBT's inaccurate loop information.

Given today's level of database inaccuracy, IP proposes various measures to soften the harmful affects of such inaccuracy while providing some additional incentives to SWBT regarding accuracy on an ongoing basis. Besides having a loop information accuracy

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[15] Although not discussed in the state 271 proceedings in Kansas or Oklahoma, SWBT has recently initiated a "yellow-zone" trial, which was recently discussed in the Missouri 271 proceeding. It is IP's position that no consideration of that trial and process is appropriate in this proceeding because CLECs were not provided an opportunity to raise the frailties of that offering to the state commissions. That being said, if the Commission is going to consider the "yellow zone" optional process, IP is on record in Missouri that that process will not solve the

performance measure subject to performance penalties, the following steps should be taken:

- Loop conditioning requirements that are not reflected in SWBT-provided loop information should not be billable to CLECs but instead treated as SWBT-caused maintenance;
- Such maintenance conditioning must be accomplished on an expedited basis; and
- CLECs should not be charged for mechanized or manual loop make-up requests when the data is incorrect, i.e. the CLEC did not receive what it requested – *accurate loop make-up information*.

Additionally, it should be noted that the proposed solutions raised by IP are independent of the actual percentage of incorrect loop-information responses. Consequentially, if SWBT attempts to argue that loop-information inaccuracy concerns of CLECs are not as bad as the many CLECs have suggested in various proceedings, SWBT is not harmed by imposing IP's proposed solutions because the solutions are triggered by specific inaccurate loop make-up responses.

Finally, it must be recognized that inaccurate loop make-up information affects CLECs to a much greater degree than SWBT's affiliate. Unlike SWBT's affiliate that may joint market under the name "SWBT", IP is new to the telecommunications marketplace. Should ASI face the same problem as IP, ASI, operating under the SWBT name, benefits from the SWBT name recognition and is likely to get a second chance. Moreover, any negative opinions of ASI resulting from a bad experience, will be outweighed by the long standing presence of SWBT in the state. As a result, IP is harmed to a much greater degree by SWBT inaccuracies as a wholesale provider than its affiliate. This last point is exemplified by the fact that while CLECs

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problems raised in these comments. Specifically, CLECs will still be forced to choose between high loop conditioning costs and taking a hit to its reputation in the marketplace by backing out of a sale.

have consistently and uniformly raised concerns regarding the debilitating affects of inaccurate loop make-up information, during the Missouri 271 proceeding, ASI testified that that such inaccuracies were not materially affecting its business.

VI. SWBT HAS NOT DEMONSTRATED THAT ITS BROADBAND OFFERINGS ARE PROVIDED IN A MANNER THAT SUPPORTS IRREVERSIBLE COMPETITION.

A. Broadband Unbundling is Part of this Proceeding

Using numbers previously provided by SBC, it has been suggested that Pronto may double the number of SBC customers that have access to advanced services over the incumbent LEC networks. Are these customers not entitled to the benefits of competition envisioned by sections 251(c) and 271 of the Federal Telecommunications Act of 1996 ("FTA")? A reading of SWBT pleadings would suggest that SWBT believes the answer is no. Notwithstanding SWBT's position, a conclusion that irreversible competition exists in the area of advanced services cannot be made while excluding half the customer base from the analysis.

One can only avoid the absurd result suggested by SWBT by reviewing the affect of Pronto on the status of competition and making an affirmative decision that for irreversible competition to exist, the unbundling rules of section 251(c) must be applied to this architecture. Moreover, the FCC has preserved this Commission's authority to avoid such a result.

In the FCC's Second Memorandum Opinion and Order, Applications of Ameritech Corp., Transferor, and SBC Communications Inc., Transferee, for Consent to Transfer Control, CC Docket No. 98-141, FCC 00-336 (rel. Sept. 8, 2000)("*Merger Condition Modification Order*"), the FCC made it clear that nothing in the opinion and/or order affects a state commission's

authority to review the appropriate regulatory treatment of the architecture. Specifically, at paragraph 2 of the *Merger Condition Modification Order*, this Commission stated the following:

> Moreover, we emphasize that this Order addresses only the commitments adopted in the *SBC/Ameritech Merger Order* and the harms addressed therein. Our interpretations and conclusions with respect to the *Merger Conditions* do not relieve SBC of any obligations under sections **251, 252, or any other provision of the Communications Act of 1934, as amended** (the Act) and our implementing rules.[16] Nor do we intend the analysis or conclusions in this Order to constrain or otherwise affect our interpretation of those rules. [Emphasis added]

In spite of this language, SBC has argued in many state 271 proceedings that the *Merger Condition Modification Order* should be read to take the issue of broadband unbundling out of the 271 process. Such use of the merger related orders as a defense in a state proceeding is, in and of itself, a violation of the merger conditions. The truth is that the status and potential irreversibility of competition cannot be separated from the enormous affect Pronto may have in the advanced services marketplace. Every moment of delay institutionalizes further SWBT market power in an area that was supposed to be a clean slate. Moreover, despite SWBT's protestations to the contrary, a decision regarding the affect of Pronto on competition affects both checklist item IV because the architecture relates to the provision of loop and subloop elements *and* checklist item II because it relates to the provision of a switching element. Lastly, assuming SWBT's argument that this Commission should refrain from addressing these issues because of the pending further notice of proposed rulemaking relating to the unbundling of next generation digital loop carrier systems, IP would point out that unlike other ILECs, SWBT and the other SBC ILECs are using this architecture now. Had SWBT's data affiliate agreed to

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[16] See 47 U.S.C. §§ 251, 252; SBC/Ameritech Merger Order at Appendix C, n.2.

refrain from using the architecture until the FCC rulemaking completed, then CLECs may have been able to agree to the same. But, SBC/SWBT cannot have it both ways. If they want to use the architecture now, then regulatory treatment cannot wait and neither is 271 relief appropriate until the issues are addressed. In this manner, CLECs will have an opportunity to compete with SWBT's data affiliate.

----- ***Project Pronto is Now***

The *Merger Condition Modification Order* was issued on September 7, 2000 and was effective on October 7, 2000. Consequently, beginning on October 7, 2000, SWBT can start offering its broadband service to ASI and CLECs. **(This assumes SWBT has obtained all necessary tariff and/or contract approval from this Commission and/or appropriate state commissions.)** Because of the immediacy, CLECs are being coerced into considering SWBT's "take-it or leave-it" language because they know that ASI, SWBT's data affiliate, (1) will take advantage of any delay, and (2) is less concerned about reasonable terms, conditions, and rates because it is SWBT's sister company. Because of this timing, this Commission is faced with a situation of not whether SBC/SWBT/ASI will gain an unfair, anticompetitive head start, but instead the issue is now how long that head start will be.[17] By balancing the Pronto issues in this proceeding before the 271 carrot evaporates, the Commission can go a long way toward minimizing the inevitable market distortions that will result from the period between October 7, 2000 and a final ruling from this Commission.

[17] With the one exception that should this Commission grant Comptel's Motion for Reconsideration of the *Merger Condition Modification Order*, then the fair opportunity to utilize broadband UNEs on an equal basis may be addressed in that proceeding.

B. Broadband Unbundling is Part of this Proceeding

IP emphasizes that SWBT is required to unbundle its Broadband offerings for a number of reasons. As background, SWBT is deploying Project Pronto with the stated primary purpose to expand the availability of ADSL to residential customers through the line sharing capabilities inherent in the cards ("ADLU") that will be deployed in Pacific's next generation remote terminals ("NGRT"). The specific equipment largely being deployed in the NGRT is a Litespan 2000 developed by Alcatel. To show how integral line sharing/residential capability is to the Project Pronto strategy, IP refers the Commission to SWBT's May 24, 2000 Accessible Letter regarding Project Pronto. That Accessible Letter repeatedly refers to the ADSL/line sharing capabilities inherent in the Project Pronto architecture. For example, the following excerpt from that Accessible Letter demonstrates the residential aspect:

> *"Project Pronto" is an investment by SBC in fiber, electronics and ATM technology to create a robust, comprehensive, data-centric broadband network architecture. One component of Project Pronto is the deployment of Next Generation Digital Loop Carrier ("NGDLC") which, through the deployment of fiber and ATM capacity, is designed to eliminate the loop length and qualification limitations traditionally associated with xDSL, thus providing broadband capability to approximately 80 percent of customer locations within SBC territory.*

Thus, Pronto is a key to obtaining terms, conditions, and rates reflecting the issues faced by DSL providers attempting to provide services to residential customers. The same Accessible Letter describes the product offering of a "high frequency portion of the subloop" ("HFPSL") as follows:

> For purposes of the HFPSL, this sub-loop will be a line-shared loop only. CLEC will lease the HFPSL to provide DSL data services over the shared copper facility. The voice portion of this loop will belong to SBC-12STATE. This option will not be available to CLEC where the retail voice (POTS) service is provided by any carrier other than SBC-

> 12STATE, including those situations where the voice service is provided by any other carrier on a resale or leased basis (e.g., UNE Platform) from SBC-12STATE.[18]

While these examples from SBC's proposed product offering are just two examples, it is undeniable that the Project Pronto offering has immediate and enormous implications on the terms, conditions, and rates faced by CLECs providing services over DSL technologies.

IP strongly objects to that characterization of Pronto only being available only as a service. Instead, SBC's original characterization of the offerings as Broadband UNEs was appropriate.

Pronto should absolutely be offered as UNEs. It is clear from a technical perspective that Pronto is comprised of elements. It is so clear that the SBC team developing the wholesale product called the offering "Broadband UNEs." It was not until the SBC's "policy" personnel reviewed the offering that the obvious was no longer so. Specifically, the offering is comprised of elements that, when combined with CLEC facilities, can be used to provide a retail service. SWBT's arguments are simply recycled arguments that failed previously. Incumbent LECs, including SWBT, argued after the passage of the 1996 Act that UNE-P was not comprised of UNEs. Instead, they argued that UNE-P was resale. Such arguments have been resoundingly rejected by several Commissions. Now SWBT argues that "Pronto" cannot be UNEs because the facilities have to work on a combined basis. As this Commission knows, such an argument does not go to the issue of whether the offering is comprised of UNEs subject to Sections 251 and 252. Instead, those arguments go to the issue of whether it is technically feasible to unbundle the Pronto offerings to a degree greater than the level offered by SWBT.

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[18] It should be noted that not only are there references to the HFPSL, there are references in the *Merger Condition Modification Order* and SBC's technical publications to the "feeder loop" portion of the architecture. Both this loop element and the subloop element are integral to a checklist item IV analysis.